CONSERVATION LAW FOUNDATION

February 9, 2009

Courtney Feeley Karp
Massachusetts Department of Energy Resources
100 Cambridge Street, Suite 1020
Boston, MA 02114

Re: RPS Class I & Class II Regulations

Dear Courtney:

The Conservation Law Foundation (CLF) appreciates this opportunity to submit comments regarding the Department of Energy Resources' (DOER) draft regulations that were promulgated on December 31, 2008 as emergency regulations intended to implement Section 32 of the "Green Communities Act." These comments address the draft regulations updating certain aspects of Class I of the Massachusetts Renewable Energy Portfolio Standard (RPS) at 225 CMR 14.00 *et seq*., and establishing a new Class II at 225 CMR 15.00 *et seq*.[1]

Overall, we believe DOER has done an admirable job with its initial efforts to implement a number of complicated new renewable and alternative energy requirements that have been mandated by the Green Communities Act. As to be expected with programs of this size and complexity, however, there are some issues that will need to be addressed. Ultimately – if a few important modifications are made – these programs will maximize their potential for boosting clean renewable energy technologies and move Massachusetts forward in our effort to address the compelling threat of climate change while also improving energy security and reliability, providing relief from volatile and escalating energy costs, and promoting the local green collar economy.

As discussed below, we are pleased that the draft regulations include some key protections that are consistent with the language and intent of the RPS statute:

- The requirement for eligible hydropower facilities to be certified by the Low Impact Hydropower Institute is expected to (i) meaningfully apply the statutory environmental criteria; (ii) promote consistency regarding eligibility determinations throughout the region; and (iii) reduce administrative burden on state agencies without sacrificing regulatory integrity.

[1] CLF is also submitting comments, via a separate letter of today's date, regarding the proposed APS regulations (225 CMR 16.00 *et seq*.), and anticipates submitting further comments by February 19 regarding the Combined Heat-and-Power and Waste-to-Energy provisions released on February 5.

62 Summer Street, Boston, Massachusetts 02110-1016 • Phone: 617-350-0990 • Fax: 617-350-4030 • www.clf.org

MAINE: 14 Maine Street, Brunswick, Maine 04011-2026 • 207-729-7733 • Fax: 207-729-7373
NEW HAMPSHIRE: 27 North Main Street, Concord, New Hampshire 03301-4930 • 603-225-3060 • Fax: 603-225-3059
RHODE ISLAND: 55 Dorrance Street, Providence, Rhode Island 02903 • 401-351-1102 • Fax: 401-351-1130
VERMONT: 15 East State Street, Suite 4, Montpelier, Vermont 05602-3010 • 802-223-5992 • Fax: 802-223-0060

• The requirement that eligible biofuels must yield at least a 50% reduction in lifecycle greenhouse gas emissions relative to emissions from petroleum distillate fuel will help ensure consistency with the recently enacted Massachusetts Clean Energy Biofuels Act and Global Warming Solutions Act.

• Class I Alternative Compliance Payment (ACP) levels will continue to escalate based on the rate of inflation, providing important predictability and support for a robust Renewable Energy Certificate (REC) market.

At the same time, we are concerned about several significant issues and urge DOER to revise the draft regulations accordingly. These issues include the following:

• The proposed revision to the Class I RPS regulations to provide eligibility for landfill methane gas transported via the interstate gas pipeline and combusted in a non-renewable energy generating facility is contrary to the RPS statute, invites legal challenge, and should be rejected.

• A related draft provision that would provide RPS eligibility for a so-called "Repowered Generation Unit" that begins to use a "Class I Renewable Fuel" subsequent to 1997 – irrespective of whether the facility itself is a renewable energy generating facility, has a commercial operation date prior to 1998, or undertakes any actual "repowering" – is clearly erroneous, directly contrary to G.L. c. 25A, s. 11F and must be removed.

• The provision that leaves the door open for eligible liquid biofuels to be derived from petroleum-based or other hazardous waste as "determined by the MassDEP" is likewise entirely inconsistent with the RPS statute and must be revised.

• Undue barriers to imported renewable energy are contrary to law and counterproductive; at a minimum, the regulations must be revised to minimize burdens on imports.

• The Class I and Class II regulations incorrectly define "Renewable Generation Unit" based on the type of fuel that is used, rather than the type of facility – improperly opening the door for traditional fossil fuel-fired facilities to be eligible under the RPS simply by utilizing some fuels classified as renewable.

• The draft Class I regulations erroneously define "Renewable Generation Unit" to include waste-to-energy facilities (whereas the corresponding Class II definition does not); to the extent waste-to-energy is required to be included at all in these regulations, it belongs in Class II, not Class I.

• The proposed revision to jettison public comment opportunities in connection with Statements of Qualification is regrettable and should be revisited. Public input is especially important for ensuring effective application of many of these new rules that never before have been tested.

• The draft regulations also should be revised to set a specific target for on-site (or behind-the-meter) generation.

Background

CLF has a long history of advocacy regarding energy policy and climate change.

Founded in 1966, the Conservation Law Foundation is a nonprofit, member-supported public interest advocacy organization. CLF is dedicated to solving environmental problems that threaten the people, communities, and natural resources in Massachusetts and throughout New England.

To further these goals, CLF undertakes litigation and other legal advocacy on behalf of its members' interests, and promotes public awareness, education, and citizen involvement in conserving natural resources, protecting public health, and promoting vital communities in the region. CLF promotes clean, renewable, and efficient energy production in New England and has an unparalleled record of expertise and advocacy to protect the region's air quality, water quality, and marine resources. For example, CLF has brought successful lawsuits to prevent drilling for oil and gas on Georges Bank, the lawsuit that led to the Boston Harbor clean-up project, and multiple lawsuits to reduce over-fishing in the North Atlantic.

CLF has been a leader in addressing the environmental impacts of New England's electric energy system. Among other things, this has included a long-standing focus on reducing the severe environmental impacts associated with generation facilities and promoting responsible clean energy alternatives. CLF has been extensively involved in the design and implementation of the Restructuring Act, including the RPS, and in numerous proceedings and rulemakings before DOER and the Massachusetts Department of Public Utilities with respect to renewable energy policies and programs.

It is in this context that we offer the following comments. Note that the following comments track the actual order of the draft Class I and Class II regulations, rather than the order of importance of the issues.

Definitions:

Eligible Liquid Biofuel: The Class I and Class II definitions of "Eligible Liquid Biofuel" erroneously leave the door open to non-renewable petroleum-based and hazardous waste. The proposed definitions in 225 CMR 14.02 and 15.02 each conclude with the following: "Waste feedstock shall not include petroleum-based waste or waste that otherwise meets the definition of hazardous waste *unless otherwise determined by the MassDEP*." (Emphasis added.) Petroleum-based and hazardous wastes are not renewable and cannot reasonably be considered as fuel for any eligible "renewable energy generating facility."[2] Accordingly, the final sentence in the

[2] The Green Communities Act created a special commission "for the purpose of making an investigation and study relative to the burning of construction and demolition waste as it relates to the renewable energy portfolio standard program established by section 11F of chapter 25A of the General Laws."

definition of "eligible liquid biofuel" should be revised to read as follows: "Waste feedstock shall not include petroleum-based waste or waste that otherwise meets the definition of hazardous waste."

CLF strongly supports the requirement reflected in the draft regulations that eligible liquid biofuels must yield at least a 50 per cent reduction in lifecycle greenhouse gas emissions relative to the lifecycle greenhouse gas emissions for petroleum distillate fuel (with the exception of waste from food service activities). This requirement is consistent with – and thus will not risk undermining – the recently enacted Massachusetts Clean Energy Biofuels Act. It also is consistent with the Massachusetts Global Warming Solutions Act, which requires a 10-25% reduction in greenhouse gas emissions from 1990 levels by 2020 and an 80% reduction by 2050, across all sectors.

Impacted Watershed: The definition of "impacted watershed" for both Class I and Class II inexplicably is limited to water bodies hydrologically connected to a water body impounded by a hydroelectric facility, even though the statute requires eligible hydroelectric facilities to pursue mitigation and enhancement measures in the impacted watershed(s) even where there is no impoundment of water and irrespective of whether the impacts are upstream or downstream of the facility or any impoundments. In addition, it is important to note that a watershed includes not just water resources but also the associated lands that drain into them. Accordingly, we recommend that the opening portion of the definition be revised to read as follows: "*All water resources hydrologically connected to a water resource from which flow is directed to or from a hydroelectric facility, and associated land areas*, whether located upstream or downstream, which experience any alteration of their physical, biological, or ecological characteristics as a result of the operation or increased capacity expansion of a Generation Unit." (Proposed revised text in italics).

Lifecycle Greenhouse Gas Emissions. In the Class I and Class II definitions of Lifecycle Greenhouse Gas Emissions, we request that clarification be made to specifically refer to both "direct and indirect land use changes." Increases in greenhouse gas emissions can be attributed both to direct conversion of land for biofuel production (e.g., converting forested land to soy biofuel feedstock production) as well as indirect conversion of land to biofuel production (e.g., when lands already used for growing soy grown as a food crop are used instead to produce soy as a biofuel feedstock, necessitating deforestation elsewhere to put new lands into production of soy as a food crop). While the definition as proposed is indeed broad enough to encompass both direct and indirect land use changes, it would be preferable to expressly state this. The new definition could be revised to read as follows: "The aggregate quantity of greenhouse gas emissions, including direct emissions and significant indirect emissions such as significant

---

Green Communities Act, Section 87. The Act sets a specific timeline of July 1, 2009 for the special commission to report the results of its investigation and its recommendations (specifically including any draft legislation) to the clerks of the Massachusetts House of Representatives and Senate. DOER should not take any steps to allow construction and demolition (C&D) debris to be deemed an eligible biomass fuel – either directly or through a back-door qualification pursuant to a Beneficial Use Determination (BUD) by DEP – at least until the special commission's work has been completed and public comment has been taken on any ensuing policy recommendations.

emissions from *direct and indirect* land use changes, as determined by the Department…" (proposed new text highlighted in italics).

Marine or Hydrokinetic Energy. The definition of Marine or Hydrokinetic Energy in Class I and Class II unnecessarily and confusingly overlaps with the definition of Hydroelectric Energy. This is of particular concern because the RPS statute includes very explicit environmental protections with respect to hydroelectric energy, and it is important not to circumvent those protections with overlapping definitions that might allow hydroelectric facilities to elect instead to be classified as hydrokinetic. Accordingly, the phrase "free-flowing water in rivers, lakes, streams" should be removed from the definition of "marine or hydrokinetic energy" so that the revised definition(s) will read as follows: "Electrical energy derived from waves, tides and currents in oceans, estuaries and tidal areas; and human-made channels, provided that such water is not diverted, impounded or dammed; or differentials in ocean temperature, called ocean thermal energy conversion."

Renewable Generation Unit. As discussed below, the new draft Class I regulations improperly appear to open up RPS eligibility for non-renewable energy generating facilities that happen to use some fuels defined as "renewable," particularly landfill gas. Part of the problem stems from the definition of Renewable Generation Unit, in that the definition is based on the fuels utilized rather than the nature of the facility itself. Thus, the proposed definition – particularly when coupled with new language regarding eligibility of landfill gas as a "renewable fuel" – arguably could allow even a traditional natural gas power plant to be characterized as a "Renewable Generation Unit" to the extent it combusts landfill gas transported through the interstate gas pipeline. Likewise, a coal plant arguably could be deemed a "Renewable Generation Unit" to the extent it combusts biomass. This result is arbitrary and capricious, clearly erroneous and contrary to the letter and intent of the RPS statute – which expressly sets a mandate for the purchase of electricity from "renewable energy generating sources," not traditional fossil fuel facilities burning some amount of fuels that are defined as (but are not necessarily) renewable. A Renewable Generation Unit should instead be defined to encompass only those facilities designed specifically to rely on the renewable the fuels, energy resources or technologies defined as Class I (or, where appropriate, Class II) renewable energy pursuant to G.L. c. 25A, s. 11F.[3]

In addition, the draft definition of Renewable Generation Unit in Class I includes "waste-to-energy that is a component of conventional municipal solid waste plant technology in commercial use," whereas the draft definition of this term in Class II does not include waste-to-energy. Given that the statute excludes waste-to-energy from Class I, waste-to-energy should be removed from the Class I definition of Renewable Generation Unit.

[3] While the draft definition of "Renewable Generation Unit" has not changed significantly from the preexisting definition, it appears that its *meaning* would change radically here in the context of the other proposed changes to the regulations – and for the first time, non-renewable energy generating facilities would be eligible under the RPS to the extent they should use eligible fuels defined as "renewable".

Section 14.05: Eligibility Criteria for RPS Class I Renewable Generation Units:

Landfill methane gas, 225 CMR 14.05(1)(a)(5): The draft Class I regulations propose adding significant new language to the provision governing eligibility for landfill methane gas. The following is a recitation of the draft provision, with DOER's proposed new language reflected in italics:

> "Landfill methane gas, provided that such gas is collected and conveyed directly to the Generation unit without use of facilities used as common carriers of natural gas, *except that such landfill methane gas may be extracted from a landfill entirely within the ISO-NE Control Area or an adjacent Control Area and transported to a Generation Unit within one of those Control Areas via a common carrier of natural gas, subject to documentation satisfactory to the Department of the gas transportation and related contracts*."

This proposed revision is entirely inconsistent with the statute, clearly erroneous, open to legal challenge pursuant to the dormant Commerce Clause, and should be rejected. Only true Landfill Gas Generating Units – in other words, a landfill gas generating unit installed on-site or directly adjacent to the landfill from which gas is collected for fuel – should be eligible under the RPS.

There are many reasons why the proposed revisions regarding landfill gas are flawed, including:

1. The RPS statute provides eligibility only for "renewable energy generating sources".[4] A natural gas plant combusting some methane derived from processed landfill gas is not transformed into a renewable energy generating facility – it is still a natural gas plant and, as such, ineligible for RPS qualification. The language of the RPS statute is clear with respect to RPS Class I eligibility only for new (post-1997) landfill gas *generating units* – not landfill gas *fuel* used in other contexts. This makes sense from a policy perspective because the RPS is geared toward assisting developers to meet daunting initial capital investment costs of renewable energy generating infrastructure that might otherwise pose a barrier to development of much-needed new clean generation.[5] Finite renewable energy incentives must not be diverted to fund natural gas or other fossil fuel-fired power plants that happen to utilize some amount of fuel

[4] Specifically, the RPS statute requires that "[e]very retail supplier shall provide a minimum percentage of kilowatt-hours sales to end-use customers in the commonwealth from *new renewable energy generating sources*." Mass. G.L. c. 25A, s. 11F (a).

[5] While the RPS regulations have allowed for co-firing with ineligible fuels (with RPS qualification allowed only for the electrical output from firing with eligible fuels) the regulations nonetheless have adhered to the basic mandate of the statute in that *the actual generation unit* must itself be a "new renewable energy generating facility" in order for its output to qualify for Class I of the RPS. *See* 225 CMR 14.05(3)(b) (2007) (regarding waivers for co-firing eligible and non-eligible fuels, requiring that "[i]f [co-firing with] an Eligible Biomass Fuel, *the entire Generation Unit must meet the requirements of an advanced biomass power conversion technology* as set forth in 225 CMR 14.05(1)(a)6.") (Emphasis added.)

characterized as "renewable."[6] A contrary result would be in direct conflict with the RPS statute and would undermine the market for new renewable energy generation.[7]

2. Landfill gas units located on-site or adjacent to landfills have qualified under the RPS from the very outset.[8] The legislature did not in any way change the language

[6] Landfill gas, unlike solar and wind energy, is not a true renewable energy resource even though the RPS statute does provide eligibility for landfill gas generating sources (presumably based on a recognition that it makes sense to capture and productively use methane released from landfills, since it is a greenhouse gas far more harmful than carbon-dioxide). However, as admitted by at least one landfill gas stakeholder during the DOER's informal stakeholder process in Fall 2008, the federal Clean Air Act and related U.S. Environmental Protection Agency (EPA) regulations already require methane gas from significant landfills to be either destroyed or beneficially reused. Given such federal requirements and the high commodity price of natural gas, there already exists a significant incentive to produce pipeline-quality methane from landfill gas for used in natural gas power plants and for residential, commercial or industrial heating.

[7] DOER has previously acknowledged the intent of the RPS statute to foster the development of new renewable energy generating sources, and has recognized the significant risks of broadening eligibility beyond the bounds set by the RPS statute. The following excerpt from DOER's October 27, 2005 Policy Statement on the RPS Eligibility of Retooled Biomass Plants (at p. 4) is instructive:

> "Since the issuance of the Biomass Retooling Guideline, DOER has seen a number of existing biomass plants seek eligibility as 'new' through retooling and, thereby, qualification to sell RECs for all of the electrical energy produced. The cost for such retooling (largely with combustion improvement and pollution control equipment) is considerably less than for the construction of an entirely new facility. Thus far, only one pre-1998 biomass facility has received a Statement of Qualification based on the Guideline. However, DOER projects that potential exists for over 750 MWs of pre-1998 biomass plants to retool. DOER believes, based in part on recent events in the Connecticut RPS market, that an influx of RECs from these plants would severely damage the REC market in Massachusetts and adversely affect the goal of the RPS program to promote the development of "new" renewable energy generating facilities.
>
> Continued application of the Biomass Retooling Guideline would drastically increase the amount of available REC-eligible generation and RECs in the market. In the face of such a large potential supply of RECs from existing plants, and the drop in REC prices likely to follow, developers of genuinely 'new' renewable generation units would be unlikely to proceed to make the investments necessary to construct those new plants. The risk of dramatically reduced REC prices, potentially well below the long-term marginal cost considered necessary to stimulate new renewable energy development, is likely to undermine the financial projections on which new development relies to obtain construction financing."

A similar, and far greater, risk is inherent here with the prospect of granting RPS eligibility for landfill gas combusted in natural gas power plants given, for example, that the longstanding gap between supply and demand for Renewable Energy Certificates (RECs) has effectively closed subsequent to the issuance of the 2005 Statement from DOER, natural gas plants typically have far larger capacities than biomass facilities, etc. One stakeholder alone, CESI, asserted in its comments filed with DOER in Fall 2008 that it manages approximately two billion cubic feet (bcf) of natural gas in the Northeast (presumably per day), including "high-Btu landfill gas" that is commingled with natural gas.

regarding landfill gas generating sources in the RPS statute when it modified a number of RPS provisions through the Green Communities Act. There is no reason to up-end the way landfill gas is handled under the RPS now.

3. By providing eligibility for landfill methane gas that originates only in the ISO-NE control area or adjacent control areas, and allowing the landfill gas to be transported through a common carrier (such as the interstate gas pipeline), the Department would be creating a significant risk of legal challenge under the dormant Commerce Clause. Unlike the electric grid, which is fundamentally incapable of delivering power to Massachusetts residents from far-flung locations like California, the interstate gas pipeline has national reach.[9] Massachusetts may not allow landfill gas methane piped in from Maine or New York to qualify for the RPS while excluding such gas from other states or regions.[10] Moreover, the legal risk would, at a minimum, result in counterproductive market uncertainty.

In light of the foregoing, we strongly recommend that DOER revise the Class I landfill gas eligibility requirement to remove the deeply flawed new language, and instead retain the language from the preexisting regulation.

Hydroelectric, 225 CMR 14.05(1)(a)(6): We strongly support the requirement that all eligible Class I and Class II hydroelectric facilities must be certified by the Low Impact Hydropower Institute (LIHI) or demonstrate that they (a) meet the stringent environmental criteria set by the Act, (b) attempted to secure LIHI certification, and (c) somehow, nonetheless, were unreasonably denied certification.

The statutory criteria for RPS eligibility for hydroelectric facilities match up well against LIHI's criteria.[11] Specifically, the statute requires eligible hydropower facilities to meet "appropriate and site-specific standards that address adequate and healthy river flows, water quality standards,

---

[8] While a number of LFG *generating units* outside the ISO-New England control area have been qualified as eligible for the Massachusetts RPS, DOER has made clear (and the preexisting regulations required) that "[o]utput from these plants will qualify as New Renewable Generation -- and thereby generate RPS-qualified GIS certificates -- only when and if they meet the special provisions of the RPS Regulations at 225 CMR 14.05(5) that pertain to any Generation Unit that is located outside of the ISO-New England control area."

[9] Indeed, tying eligibility of landfill gas to a geographic area within and adjacent to the ISO-NE Control Area is arbitrary, given that the limits to the geographic reach of the ISO-NE electric grid are absent in the context of the interstate gas pipeline.

[10] Where, as here, a state regulation is facially discriminatory against interstate commerce, a "virtually per se rule of invalidity" applies, and such statutes are "routinely struck down." New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 274 (1988). The presumption of unconstitutionality can only be rebutted if the state can demonstrate that the discriminatory measure advances a "legitimate local purpose" that cannot be "adequately served by reasonable non-discriminatory alternatives." Oregon Waste Sys. Inc. v. Dept. of Envtl. Quality of Oregon, 511 U.S. 93, 100 (1994); Wyoming v. Oklahoma, 502 U.S. 437 (1992); New England Power Co. v. New Hampshire, 455 U.S. 331 (1982). Here, no such legitimate local purpose exists and the proposed regulation is unconstitutional because it would allow RPS eligibility for landfill methane gas only if it is injected into the pipeline within or nearby the ISO-NE control area.

[11] See Mass G.L. c. 25A, s. 11F(c), (d); LIHI "Summary Criteria" at http://www.lowimpacthydro.org/.

fish passage and protection measures and mitigation and enhancement opportunities in the impacted watershed as determined by the department in consultation with relevant state and federal agencies having oversight and jurisdiction over hydropower facilities." Mass. G.L. c. 25A, s. 11F(c) and (d).

Requiring LIHI certification is an elegant way of applying the statutory environmental criteria while ensuring (1) *consistency*, by having the same entity involved in applying the criteria across the board and throughout the region; (2) *knowledgeable* consideration of each facility's impacts, given LIHI's extensive experience with minimizing the environmental impacts of hydroelectric facilities; and (3) that the *administrative burden on state agencies will be minimized* without compromising regulatory integrity.

Contrary to the arguments of hydropower proponents, existing federal licenses are *not* enough to demonstrate RPS eligibility. This argument might have made sense if there were no specific environmental criteria for hydropower in the RPS statute, as is the case for a number of eligible technologies including wind, solar, ocean thermal, wave and tidal energy. However, as with biomass (for which the statute specifically requires a "low emission" standard), existing state and federal permits are *not* enough in and of themselves to warrant RPS eligibility for hydropower facilities; instead, specific environmental performance must be ensured. The statutory environmental criteria cannot simply be read out of existence as hydropower proponents propose.

While some hydropower proponents claim that LIHI certification is too costly, the truth is that LIHI's certification fees are not large. What the proponents really seem to be arguing against is the cost of the upgrades that would be needed to meet LIHI's environmental performance standards – which closely track the environmental performance standards of the RPS statute itself. The hydropower proponents' arguments thus are unfounded because the statute *requires* superior environmental performance, which in many instances is likely to require upgrades. So, these costs are unavoidable for facilities that currently do not meet the statute's – or LIHI's – criteria yet are seeking eligibility under the RPS. Moreover, the costs of upgrades can be recouped in whole or in significant part through (1) REC revenue and/or (2) grants pursuant to the Renewable Energy Trust Fund's hydropower program.

There are, however, a couple modifications that we recommend in connection with the draft hydropower eligibility provisions:[12]

1. Sections 14.05(1)(a)(6)(c) and 15.05(a)(6)(c) should be deleted. These provisions currently read as follows: "The Unit does not generate Marine or Hydrokinetic Energy." This exclusion does not make sense. If hydrokinetic facilities were excluded from the provisions governing eligibility for hydroelectric facilities, as proposed, they could evade the statutory environmental criteria applicable to hydroelectric facilities. Instead, the eligibility criteria for marine and hydrokinetic

[12] We note that there appear to be several clerical errors whereby internal cross-references in the Class II regulations refer to sections of the Class I regulations when they should refer to Class II – e.g., at 15.05(1)(a)(6)(d) *et seq*. – and assume that these cross-references will be corrected when the regulations are finalized.

facilities should be modified to include only those facilities not already governed by the hydroelectric facility eligibility requirements, as suggested below.

2. Sections 14.05(1)(a)(6)(d)(ii) and 15.05(1)(a)(6)(d)(ii) should be modified to clarify that the owner of a hydroelectric facility denied certification by LIHI must demonstrate that the relevant facility nonetheless meets the statutory (and LIHI's) environmental criteria and was unreasonably denied certification. E.g., the language could be revised to read as follows: "[The Unit shall demonstrate compliance with relevant standards by submitting a] denial of certification from LIHI specifying the reasons the certification was denied and the applicant's proposed rational for why the project *meets the criteria of G.L. c. 25A, s. 11F for minimizing environmental impacts, is asserted to meet LIHI's certification criteria yet was unreasonably denied, and* should nevertheless receive a Statement of Qualification." (Proposed new text denoted with italics.)

Low-emission, Advanced Biomass Power Conversion Technologies using an Eligible Biomass Fuel, Sections 14.05(1)(a)(7) and 15.05(1)(a)(8): The RPS statute mandates that both Class I and Class II biomass facilities must meet a "low emissions" standard in order to be eligible. The draft regulations refer to emissions "Guidelines," but neither recite those Guidelines within the text of the regulations nor expressly state whether DOER's existing emissions Guidelines for biomass facilities shall apply to Class I and Class II biomass facilities. We ask that DOER clarify its intentions with respect to the applicability of the existing Guidelines (that were developed before Class II was statutorily created) to biomass facilities in both Classes. Any proposed modifications to the Guidelines should be made available for public comment before being finalized. Unless (or until) the Department sets specific, separate emissions limits for Class II biomass, the limits previously set for Class I should be applied.

Marine or Hydrokinetic Energy, Sections 14.05(1)(a)(8) and 15.05(1)(a)(9): As discussed above, modifications are needed in order to clearly and effectively distinguish between marine and hydrokinetic energy, on the one hand, and hydroelectric, on the other. In addition to the revisions we have proposed with respect to the regulations governing eligibility for hydroelectric facilities, we also recommend that the reference to "Marine or Hydrokinetic Energy" in Sections 14.05(1)(a)(8) and 15.05(1)(a)(9) be qualified to exclude hydroelectric: i.e., "Marine or Hydrokinetic Energy, other than Hydroelectric facilities that are required to meet the eligibility requirements of [Section 14.05(1)(a)(6)/Section 15.05(1)(a)(6)] above."

Commercial Operation Date, Section 14.05(b): To ensure effective implementation of the statutory mandate that only *new* renewable energy generating facilities qualify for Class I, Section 14.05(b) should be revised to read as follows (with proposed new text reflected in italics): The *first* Commercial Operation Date *of the Generation Unit* shall be after December 31, 1997, unless the Generation Unit received a Statement of Qualification with a Vintage Waiver prior to January 1, 2009."

Behind-the-meter-Generation, Sections 14.05(d)(2) and 15.05(d)(2): Given the statutory requirement for renewable energy to be sold to end-use customers in the

Commonwealth, it makes sense to ensure that behind-the-meter generation located outside Massachusetts only is eligible to the extent that electrical output is sold into the electric grid (and thus made available for delivery to Massachusetts customers). Electric power consumed on-site outside Massachusetts should not be eligible because is not available for delivery to Massachusetts customers. Accordingly, we recommend that Sections 14.05(d)(2) and 15.05(d)(2) be revised to add language along the lines of the following: "For behind-the-meter generation located outside Massachusetts, only the electrical energy output not consumed on site shall be eligible."

Capacity Obligation, Sections 14.05(e) and 15.05(e): As discussed in detail in CLF's comments[13] submitted to DOER in connection with its Fall 2008 feasibility study regarding capacity and "netting" restrictions for imported renewable energy, undue restrictions placed on RPS eligibility for renewable energy imported into the ISO-NE control area are inappropriate, inconsistent with the dormant Commerce Clause[14] and the North American Free Trade Agreement, and contrary to the clean energy objectives of the RPS. Among other things, while we appreciate that the draft regulations leave the door open for RPS eligibility for facilities located outside of the ISO-NE Control Area that have been found ineligible to participate in the ISO-NE Forward Capacity Market, the regulations are unreasonably vague with respect to how the Department would determine whether to qualify such facilities for eligibility under the RPS and will create undue barriers to market participation by these clean energy resources. Ultimately, the regulations must not discriminate between clean renewable energy sources based on their location, so long as these clean energy sources are capable of supplying electricity to customers in Massachusetts.

The proposed Capacity Obligation set forth at Sections 14.05(1)(e) and 15.05(1)(e) should be revised so as not to create an undue barrier to participation by Intermittent Generation Units located in control areas adjacent to the ISO-NE Control Area. As currently written, the regulations would require such generating units to de-list a portion or all of their capacity from any capacity market other than the ISO-NE Forward Capacity Market (FCM), forcing these units to forego capacity incentives that may be critical to their financial viability. This is particularly inequitable with respect to generators that already were found eligible pursuant to the Massachusetts RPS (pursuant to a Statement of Qualification or otherwise) prior to July 2, 2008, given that such facilities would be required to cease any of their current participation in external capacity markets once existing obligations expire. Moreover, the requirements seem to improperly conflate a capacity obligation with an agreement to actually sell power, even though these are fundamentally different things. It is entirely consistent for a facility to make a commitment to have some or all of its electrical output available to sell to a particular market upon demand, but to actually sell the power into another market so long as the demand in the first market does not arise. So long as RPS eligibility only attaches to power actually sold into the ISO-NE control area, any capacity commitments made elsewhere should not be a barrier.

The proposed regulations include a provision whereby DOER *may* allow participation in an external capacity market in the event that a Generation Unit is deemed unqualified for

[13] See CLF's October 1, 2008 Initial Comments – RPS Imports, and CLF's October 7, 2008 Reply Comments – RPS Imports at www.mass.gov/doer.
[14] *See* p. 8, n. 10, *supra*.

participation in the ISO-NE Forward Capacity Market (FCM) "for technical reasons." But given that it is not feasible for Intermittent Generation Units in adjacent control areas to participate in the ISO-NE FCM, as DOER has acknowledged, it makes no sense to require the owners or operators of such units to (1) forego capacity payments from markets in control areas other than ISO-NE and (2) engage in the fruitless and burdensome exercise of pursuing unattainable FCM eligibility, before they can be considered for an exemption. Moreover, the proposed exemption from the ISO-NE FCM obligation set forth at 225 CMR 14.05(1)(e)(3)) is vague, provides no guidelines for DOER's determination, and thus leaves the outcome unpredictable.

Thus, at a minimum, Section 14.05(1)(e)(3) should be rewritten as follows: "An RPS Class I Renewable Generation Unit that is an Intermittent Generation Unit located outside the ISO-NE control area, or that is otherwise verified by the Department as unqualified for participation in the ISO-NE Forward Capacity Market, may commit capacity to another control area and may receive GIS Certificates for the energy sold into the ISO-NE Control Area."[15]

Co-Firing and Blended Fuel Waiver, Sections 14.05(3) and 15.05(2): The proposed new Class I and Class II provisions regarding co-firing and blending fuel waivers is problematic because it erroneously implies that "all" of a facility's output could qualify under the RPS even if ineligible fuel is used. Instead, the language of the preexisting co-firing and blended fuel waiver regulation should be retained and modified to reflect the new Class I and Class II tiers, as follows:

"A Generation Unit that uses an ineligible fuel in conjunction with an Eligible RPS [Class I/Class II] Renewable Fuel may qualify as an RPS [Class I/ClassII] Renewable Generation Unit provided the Generation Unit meets the eligibility requirements of 225 CMR 14.05, subject to the limitations in 225 CMR 14.05(3)."

Special Provisions for a Massachusetts On-Site Generation Unit, Section 14.05(4): We agree with other commenting parties that the draft regulations should be revised to set a specific target for on-site (or behind-the-meter) generation. On-site generation for the first time is explicitly recognized in the RPS statute, and there is considerable support for specific targets for on-site generation to help ensure that clean distributed generation will receive a much-needed boost. Moreover, setting specific on-site generation targets will help promote the objectives of the Commonwealth's Solar Initiative (calling for 250 MW of solar to be installed in Massachusetts by 2017) and Wind Initiative (calling for 2000 MW of wind to be installed in Massachusetts by 2020).

Special Provisions for a Generation Unit Located in a Control Area Adjacent to the ISO-NE Control Area, Sections 14.05(5)(d), 15.05(3)(d): The so-called "netting" provisions, intended to prevent any prospective "greenwashing" by requiring imports of renewable energy to be eligible only net of concurrent exports by the same entity, require some modification in order to be reasonable and achieve their objective. The provisions in Section 14.05(5)(d) and

[15] In the event the final regulations continue to include heightened capacity requirements that create undue burdens for imported renewable energy, a result that would be inconsistent with the dormant Commerce Clause, at an absolute minimum the facilities that were deemed eligible under the RPS prior to July 2, 2008 should be grandfathered.

15.05(3)(d) are overly broad, in requiring attestations from a Generation Unit's Owner or Operator with respect to its "affiliates" or "other contracted parties" – third parties whose actions the attesting party cannot control (or possibly even know). The language should be rewritten to require owners/operators to attest that they have not engaged in "round-tripping" either directly or by directing an agent to engage in such practices. In addition, the provision should be modified to make clear that it only applies for the purpose of RPS eligibility, and does not pertain to import/export transactions where no RPS eligibility is sought. For example, the provision could be rewritten as follows:

"(d) The Generation Unit Owner or Operator must provide an attestation in a form to be provided by the Department that it will not itself engage in the process of intentionally "greenwashing" whereby RPS Class I Renewable Generation is imported into the ISO-NE Control Area for the creation of RPS Class I Renewable GIS Certificates and the same amount of energy out of the ISO-NE Control Area is simultaneously exported during the same hour. The provisions of this section shall not apply to energy transactions that are unrelated to imports for the purpose of creating Class I Renewable GIS Certificates."

Special Provisions for Relocated, Repowered, and Replacement Generation Units, Section 14.05(7)(b): One of the most unfounded and problematic draft regulations is set forth at Section 14.05(7)(b). This tersely worded provision states that DOER may provide a Statement of Qualification to a Generation Unit that meets the requirement for a "Repowered Generation Unit," i.e., a "Generation Unit that did not utilize an Eligible RPS Class I Renewable Fuel at any time on or before December 31, 1997." No definition is supplied for "Repowered Generation Unit," although "repower" is a loaded term in the electric generation context. Most troubling is that this provision appears to be intended to allow any "Generation Unit" – i.e., "a facility that converts a fuel or an energy resource into electrical energy" – to qualify under the RPS if it uses an eligible RPS Class I Renewable Fuel for the first time after December 31, 1997. Such a provision is clearly erroneous and entirely inconsistent with the RPS statute, which requires a facility seeking Class I RPS eligibility to be both a "*renewable energy* generating facility" and "*new,*" with a commercial operation date after December 31, 1997. Mass. G.L. c. 25A, s. 11F.[16]

From a practical perspective, it may make sense to encourage existing fossil fuel-fired power plants to switch to renewable fuels, but the Class I RPS regulations are a wildly inappropriate tool for achieving such an objective. Among other reasons why this provision should be rejected, (1) the RPS statute clearly requires more than mere fuel-switching; (2) there are existing non-RPS incentives for such fuel switching, including offset credits to assist with compliance in meeting regulatory or market-driven commitments to reduce emissions; and (3) fuel-switching is comparatively inexpensive and would undermine the objectives of the RPS in providing critical financial support for the deployment of renewable energy generation (rather than supporting fossil fuel-fired infrastructure that, at the end of the day, could revert back to reliance on fossil fuels).

[16] See related discussion at pp. 6-7 (including n. 7), *supra*.

Statement of Qualification Process for RPS Class I Renewable Generation Units, Sections 14.06(2)(b) and 15.06(2)(B): Unlike the preexisting regulations that required opportunities for public comment in connection with some of the more delicate determinations made by DOER with respect to RPS eligibility,[17] the new draft regulations would jettison all requirements for public comment opportunities in connection with Statements of Qualification. While DOER of course may still offer public comment opportunities in its discretion – and we urge DOER to do so in any event – the lack of a clear commitment to such public comments is regrettable and should be revisited, especially given that so many of these new provisions are entirely untested.

RPS Effective Date, Section 15.06(4): Although the draft Class I regulations explicitly provide that the RPS effective date for any hydroelectric unit "shall not be earlier than the date on which the Department determined that the Unit has commenced compliance with the environmental conditions in its Statement of Qualifications," corresponding language is missing from the Class II regulations. This omission should be corrected.

Renewable Energy Portfolio Standard – Class II, Section 15.07(1): While the initial target for RPS Class II (set at 3.6 percent of load) appears reasonable, we urge DOER to regularly revisit this target based upon the amount of eligible Class II generation and material increases or decreases in load. Since the pool of Class II renewable energy resources is expected to remain relatively stable over time (in contrast to the pool of Class I resources, which the RPS intends to grow rapidly), a fixed percentage target for Class II only makes sense to the extent that there is no load growth. If load increases, the target percentage for Class II should be reduced; conversely, if load decreases the target percentage should increase.

Compliance Procedures for Retail Electricity Suppliers, Sections 14.08(1) and 15.08(1): The draft regulations include important language to protect against "double-counting" of renewable energy attributes, as set forth at Sections 14.08(1) and 15.08(1). For example, these provisions prevent the same facility from securing RECs from multiple states in connection with the same electrical output. However, the draft regulations do not fully protect against double-counting with respect to concurrent obligations *within* Massachusetts. For example, a facility should not be permitted to count co-firing with renewable fuel both toward offsets and for RPS credit. Accordingly, the language of the final sentence of this provision in the Class I and Class II regulations should be revised as follows: "A Retail Electricity Supplier shall demonstrate to the satisfaction of the Department that RPS [Class I/ClassI] Renewable Generation Attributes used for compliance have not otherwise been, nor will be, sold, retired, claimed, used or represented as part of electrical energy output or sales, or used to satisfy *other* obligations in *Massachusetts or other* jurisdictions."

---

[17] The preexisting rule was stated as follows: "The Division *shall provide an opportunity for public comment* on such application for a Statement of Qualification if the Generation Unit would:
1. use an Eligible Biomass Fuel and is not required to have a Valid Air Permit; or
2. co-fire an Eligible New Renewable Fuel in a Generation Unit in conjunction with ineligible fuels; or
3. use an Eligible Biomass Fuel in conjunction with a Vintage Waiver." 225 CMR 14.06(2)(b) (2007) (emphasis added).

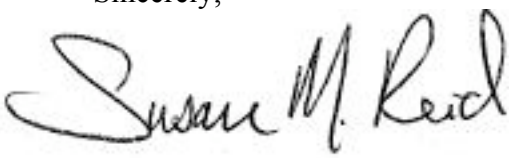
Conclusion

Thank you, again, for the opportunity to provide these comments. We appreciate the breadth and complexity of the myriad renewable and other clean energy programs that DOER is responsible for implementing, and the admirable work that has been done to date.

DOER has included many critical safeguards in the draft Class I and Class II RPS regulations, and we encourage further revisions be made that will build upon this important framework. CLF also strongly encourages DOER to revise the draft regulations as discussed above in order to maintain the integrity of the RPS, including by continuing to ensure that only *new renewable energy generating facilities* are eligible pursuant to RPS Class I, as required by the governing statute.

We look forward to continuing to work with DOER to maximize the effectiveness of the RPS.

Sincerely,



Susan M. Reid, Esq.
Director, MA Clean Energy & Climate Change Initiative

cc: Phil Giudice, Commissioner
Rob Sydney, General Counsel